

March 24, 2008

Barbara A. Schermerhorn
ClerkNOT FOR PUBLICATIONUNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUITIN RE LANCE J. EWING and
PATRICIA L. EWING,

Debtors.

BAP No. UT-07-074

STEPHEN W. RUPP, Trustee,

Appellant,

Bankr. No. 05-29650
Chapter 13

v.

ORDER AND JUDGMENT*

LANCE J. EWING and PATRICIA L.
EWING,

Appellees.

Appeal from the United States Bankruptcy Court
for the District of UtahBefore BROWN, McNIFF, and RASURE¹, Bankruptcy Judges.

RASURE, Bankruptcy Judge.

The Appellant, Stephen W. Rupp (“Rupp”), served as the Chapter 7 Trustee of the bankruptcy estate of Appellees Lance J. and Patricia L. Ewing (the “Ewings”) before their Chapter 7 case was converted to a case under Chapter 13. The Ewings’ Chapter 13 case was eventually dismissed because they failed to propose a confirmable plan. Approximately nine months after the Chapter 13

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

¹ Honorable Dana L. Rasure, United States Bankruptcy Judge, United States Bankruptcy Court for the Northern District of Oklahoma, sitting by designation.

case was dismissed, Rupp filed a motion requesting the bankruptcy court to reopen the case, reconvert the case to Chapter 7, and set a scheduling conference in an adversary proceeding that Rupp, as Chapter 7 Trustee, had filed prior to conversion of the case to Chapter 13. In the adversary proceeding, Rupp had objected to the Ewings' discharge and sought to recover from the Ewings certain alleged unscheduled assets.

Treating Rupp's motion as a motion to vacate dismissal of the Chapter 13 case pursuant to Rule 60(b) of the Federal Rules of Civil Procedure ("Rule 60(b)"), the United States Bankruptcy Court for the District of Utah entered the Order Denying Motion to Reopen and Reconvert Case and Motion for Pre-Trial Scheduling Order in Adversary Proceeding No. 05-2776 (the "Order"). Rupp has timely appealed the Order.

Because we conclude that Rupp lacked standing to request the relief sought below, and therefore the bankruptcy court lacked jurisdiction to adjudicate Rupp's motion, the Order must be vacated and this proceeding remanded to the bankruptcy court with instructions to deny the motion for lack of jurisdiction.

I. APPELLATE JURISDICTION

The Bankruptcy Appellate Panel has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.² Neither party has elected to proceed before the district court.

A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"³ An order denying

² 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8001(e); 10th Cir. BAP L.R. 8001-1.

³ Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 712 (1996), *quoting* Catlin v. United States, 324 U.S. 229, 233 (1945).

Rule 60(b) relief is a final, appealable order.⁴ Here, the bankruptcy court refused to vacate the dismissal of the Chapter 13 case pursuant to Rule 60(b), and consequently refused to reopen and reconvert the case to Chapter 7. No post-judgment motion is pending. The Order is final for purposes of review.

II. STANDARD OF REVIEW

Because granting relief under Rule 60(b) is highly discretionary, denial of Rule 60(b) relief is generally reviewed for abuse of discretion.⁵ A bankruptcy court's denial of a motion to reopen a case is also reviewed under an abuse of discretion standard.⁶

Although neither the parties nor the bankruptcy court addressed below whether Rupp had standing to seek to vacate the dismissal of the Chapter 13 case in order to reopen the case and reconvert it to Chapter 7 so that Rupp could pursue administration of the estate for the benefit of Ewings' creditors, "[s]tanding . . . raises jurisdictional questions and we are required to consider 'the issue *sua sponte* to ensure that there is an Article III case or controversy' before us."⁷ "[E]very federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it."⁸ "It is a long-settled principle that standing cannot be inferred argumentatively from averments in the

⁴ See Stouffer v. Reynolds, 168 F.3d 1155, 1172 (10th Cir. 1999).

⁵ See In re Woods, 173 F.3d 770, 779 (10th Cir. 1999).

⁶ See id. at 778.

⁷ Rector v. City and County of Denver, 348 F.3d 935, 942 (10th Cir. 2003), quoting People for the Ethical Treatment of Animals v. Rasmussen, 298 F.3d 1198, 1202 (10th Cir. 2002).

⁸ FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (citation and internal quotation marks omitted).

pleadings, but must affirmatively appear in the record.”⁹

As a threshold jurisdictional matter, we must determine whether Rupp had standing to seek vacation of the dismissal of the Chapter 13 case in order to prosecute the adversary proceeding to recover assets for the benefit of the Ewings’ creditors.¹⁰

III. BACKGROUND

The relevant facts were not contested. On June 20, 2005, the Ewings filed a petition for relief under Chapter 7, and Rupp was appointed Chapter 7 Trustee.¹¹

On October 24, 2005, Rupp obtained an order requiring the Ewings to turn over personal and business books and records, tax returns, and certain tax refunds (the “Turnover Order”). The Ewings did not comply with the Turnover Order. On December 12, 2005, Rupp filed a complaint in Adversary Proceeding No. 05-2776 GEC (the “Adversary Proceeding”), requesting that the bankruptcy court deny the Ewings’ discharge pursuant to various subsections of Section 727(a)¹² of the Bankruptcy Code for failing to comply with the Turnover Order, failing to keep records, failing to explain losses, and failing to report and turn over property of the estate (the “Complaint”). In addition, Rupp sought a money judgment against the Ewings in the amount of the tax refunds that had been the subject of the

⁹ Id. (citation and internal quotation marks omitted).

¹⁰ Because standing was not addressed below, the Court extended to Rupp and the Ewings an opportunity to brief the issue. Both parties submitted supplemental briefs, and the briefs have been considered by the Court in determining whether Rupp had standing below.

¹¹ The Ewings’ bankruptcy petition was filed before the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). Because BAPCPA applies only in cases filed on or after its effective date of October 17, 2005, all statutory references to the Bankruptcy Code, Title 11 of the United States Code, are to the Code sections as they appeared before BAPCPA.

¹² Rupp also requested that the Ewings’ discharge be denied under Section 727(d) of the Bankruptcy Code, but Section 727(d) provides for the revocation of a discharge that has already been granted.

Turnover Order and the value of a receivable that Rupp alleged was owed to the Ewings by their wholly owned business entity. These assets had not been listed by the Ewings on their schedules.

On April 20, 2006, the Ewings filed a motion to convert their Chapter 7 case to a case under Chapter 13. Rupp did not object to the motion.¹³ On April 24, 2006, the Ewings filed an answer in the Adversary Proceeding generally denying the allegations in the Complaint. On April 28, 2006, the bankruptcy court entered an order converting the Chapter 7 case to one under Chapter 13.

On July 11, 2006, after a contested confirmation hearing, the bankruptcy court dismissed the Ewings' Chapter 13 case due to their failure to propose a confirmable plan. Although Rupp contended that the Ewings converted the case to Chapter 13 to avoid turning over property of the estate to him as the Chapter 7 Trustee, and that they purposefully failed to prosecute the Chapter 13 case so that their case would be dismissed, neither Rupp nor the Chapter 13 trustee sought reconversion of the case to a Chapter 7 prior to its dismissal.¹⁴

¹³ In fairness to Rupp, the Court recognizes that at the time the Ewings filed their motion to convert, controlling law in this Circuit held that a debtor had a one-time, absolute, unwaivable right to convert a Chapter 7 case to one under Chapter 13 pursuant to Section 706(a) of the Bankruptcy Code, which right a bankruptcy court could not deny even in the face of an objection that conversion was motivated by bad faith on the part of the debtor. See In re Miller, 303 B.R. 471 (10th Cir. BAP 2003), *abrogated by* Marrama v. Citizens Bank of Mass., 127 S.Ct. 1105 (2007).

In Miller, this Court concluded that the plain meaning of Section 706(a) precluded bankruptcy courts from exercising discretion to refuse to convert a case when conversion was motivated by bad faith, but that bad faith could be scrutinized and addressed after conversion through the confirmation process or upon a motion seeking reconversion. *Id.* at 476-77. In light of Miller, any objection by Rupp to the Ewings' motion to convert would have been futile and perhaps sanctionable. In 2007, however, the United States Supreme Court held that a bankruptcy court may deny a bad faith motion to convert a Chapter 7 case to Chapter 13, either by considering the debtor not qualified to be a debtor under Chapter 13, or by exercising powers under Section 105(a) to prevent an abuse of process. See Marrama, 127 S.Ct. at 1111-12.

¹⁴ This may be because Rupp recognized that as former Chapter 7 Trustee, he lost standing to act on behalf of the estate in the Chapter 13 case. A Chapter 13 trustee, however, may act on information concerning a debtor's prior misconduct

(continued...)

The Bankruptcy Case Docket Sheet and Adversary Proceeding Docket Sheet both contain a docket entry dated July 18, 2006, reflecting that the Adversary Proceeding was “[d]isposed.”¹⁵ The Adversary Proceeding Docket Sheet also indicates the status of the proceeding as “terminated” as of July 18, 2006.¹⁶ However, it does not appear that any order had been entered dismissing or otherwise disposing of the Complaint.

The Order dismissing the Chapter 13 case was filed on July 21, 2006, and the Chapter 13 Trustee filed the Trustee’s Chapter 13 Final Report and Account on October 25, 2006.¹⁷ On or about November 28, 2006, the bankruptcy court clerk requested that Rupp file the accounting a Chapter 7 Trustee is required to file after the conversion of a case to Chapter 13, apparently to complete the record so the case could be administratively closed. On December 15, 2006, Rupp filed a “Trustee’s No Asset Report,” in which Rupp declared, among other things, that he “received neither money nor property of this estate,” that there were minimal or no non-exempt assets, that “if the case has converted to a case under Chapter 13, . . . any assets collected by the Trustee have been delivered to the Chapter 13 Standing Trustee,” and that “any non-exempt real or personal property listed by the debtor, if not previously abandoned by the Trustee, is hereby abandoned.”¹⁸ Rupp further stated that “[p]ursuant to FRBP 5009, the Trustee hereby certifies that the estate of the above-named debtor has been fully

¹⁴ (...continued)
that is provided by a former Chapter 7 trustee, or may independently determine that it is in the best interests of the creditors that a case be reconverted to Chapter 7.

¹⁵ Bankruptcy Case Docket Sheet at 5 and Adversary Proceeding Docket Sheet, in Appendix of Appellant (“APPX”) at 5, 10.

¹⁶ Adversary Proceeding Docket Sheet, in APPX at 9.

¹⁷ Bankruptcy Case Docket Sheet at 5, in APPX at 5.

¹⁸ Bankruptcy Case Docket Sheet at 4, in APPX at 4.

administered.”¹⁹ On December 18, 2006, the Chapter 13 bankruptcy case was closed.²⁰

In the meantime, on October 27, 2006, three months after the Chapter 13 case was dismissed, the Ewings filed another Chapter 7 petition. That case was dismissed on December 19, 2006, for failure to timely file all required documents. Rupp was not the Chapter 7 Trustee in that case. However, during the month of December 2006, Rupp contacted the Ewings’ counsel advising him of his intention to continue prosecuting the Adversary Proceeding to recover the tax refunds and the alleged receivable because Rupp believed that the Ewings were abusing the bankruptcy system.²¹

On April 10, 2007, Rupp filed a Motion to Reopen and Reconvert Case and Motion for Pre-Trial Scheduling Order in Adversary Proceeding No. 05-2776 (the “Motion to Reopen”). As cause to reopen the dismissed Chapter 13 case, Rupp contended that the Adversary Proceeding had never been resolved and that the tax refunds and the receivable had never been administered for the benefit of the Ewings’ creditors. Thus, Rupp requested the court to reopen the Chapter 13 case, reconvert it to a Chapter 7 case, and allow Rupp to prosecute his objection to discharge and his claim for a money judgment against the Ewings on behalf of the Ewings’ creditors.

The Ewings objected to the Motion to Reopen. The Ewings argued that the motion constituted a request under Rule 60(b) to vacate the dismissal of the

¹⁹ Id.

²⁰ Id.

²¹ Since Rupp was no longer the Chapter 7 Trustee of the Ewings’ bankruptcy estate at that time, and another person was serving as Chapter 7 trustee in the subsequent Chapter 7 case, it is unclear why Rupp believed he (rather than the subsequent Chapter 7 trustee) had the authority to demand the recovery of alleged estate assets for the benefit of the Ewings’ creditors.

Chapter 13 case²² that occurred nine months earlier, and the motion was therefore untimely.²³ In addition, the Ewings contended that Rupp's claim for denial of discharge was mooted by the dismissal of their Chapter 13 case. Finally, the Ewings argued that they, and their creditors, should be able to rely on the finality of the dismissal order, and Rupp failed to show circumstances to warrant upsetting such finality.

Rupp responded that the Ewings had acted in bad faith in procuring the conversion and dismissal of their case in order to conceal assets from the prying eyes of their Chapter 7 Trustee. Rupp also argued that his Motion to Reopen was timely because any delay in filing it was occasioned by Rupp's attempts in December 2006 to persuade the Ewings to confess a money judgment in his favor in the Adversary Proceeding.

On May 9, 2007, the bankruptcy court held a hearing on the Motion to Reopen at which the parties briefly reiterated their arguments. The only evidence admitted was a letter from Rupp to the Ewings' counsel dated December 8, 2006, in which Rupp proposed that the Ewings agree to the entry in the Adversary Proceeding of a money judgment in his favor in the amount of \$48,000, which he

²² Rupp now concedes that "[i]n effect, the Trustee's motion was one under Rule 60(b) of the Federal Rules of Civil Procedure because he sought to set aside the dismissal of the case." Br. of Appellant at 2.

²³ At the time the Motion to Reopen was adjudicated, Rule 60(b), made generally applicable to bankruptcy proceedings by Rule 9024 of the Federal Rules of Bankruptcy Procedure, stated in relevant part—

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . . ; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . . ; or (6) any other reason justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b) (2005) (subsequently amended, eff. Dec. 1, 2007).

would attempt to collect on behalf of creditors in the dismissed case.

The bankruptcy court, ruling from the bench, did in fact consider the Motion to Reopen as a Rule 60(b) motion rather than a motion to reopen under Section 350(b) of the Bankruptcy Code, and concluded that Rule 60(b) relief was not warranted because (1) the assets Rupp sought to administer had been abandoned; (2) Rupp did not prove any fraud, misrepresentation or misconduct by the Ewings; and (3) the motion was untimely.

IV. ISSUES ON APPEAL

As framed by Rupp, the issues on appeal are (1) whether the bankruptcy court erred in denying his Motion to Reopen based on its legal conclusion that the assets Rupp sought to administer had been abandoned and (2) whether the bankruptcy court erred in denying the Motion to Reopen on the ground that it was not timely. Because we conclude that Rupp did not have standing to seek to vacate the dismissal of the Chapter 13 case, we need not reach the merits of Rupp's appeal.

V. CONCLUSIONS OF LAW

A. Conversion to Chapter 13 terminated the service of the Chapter 7 Trustee

Relevant to the issue of standing is what authority, if any, Rupp had to act on behalf of the Ewings' estate and for the benefit of the Ewings' creditors after the bankruptcy case was converted to Chapter 13. Section 348(e) of the Bankruptcy Code provides that "[c]onversion of a case under section 706, 1112, 1208, or 1307 of this title terminates the service of any trustee or examiner that is serving in the case before conversion."²⁴

On April 28, 2006, the Ewings' Chapter 7 case was converted to a case

²⁴ 11 U.S.C. § 348(e).

under Chapter 13 under Section 706(a),²⁵ and consequently, Rupp's service as Chapter 7 Trustee terminated by operation of law. "[O]nce conversion occurs, the duties of a chapter 7 trustee cease, and he is deprived of any standing to pursue matters in the chapter 13 case in his capacity as trustee."²⁶ Although a displaced Chapter 7 trustee *may* have standing as an administrative claimant in the Chapter 13 case to recover for services rendered in the Chapter 7 case, the trustee is "without standing to act on behalf of the estate, either to challenge the conversion or for any other purpose, including prosecuting or defending tort actions that belonged to the estate."²⁷ Section 348(e) deprived Rupp of standing to pursue the Adversary Proceeding or take any other action on behalf of the Ewings' creditors.

B. Conversion vested all property of the estate in the Ewings

Moreover, upon conversion of a Chapter 7 case to Chapter 13, all property of the estate is returned to the debtor through operation of law.²⁸ A Chapter 13 debtor no longer has any obligation to turn property over to a Chapter 7 trustee;

²⁵ "The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable." 11 U.S.C. § 706(a).

²⁶ Mann v. Hahn (In re Hahn), 167 B.R. 693, 694 (Bankr. N.D. Ga. 1994). In Hahn, the court held that the Chapter 7 trustee lost standing to object to the debtor's discharge upon conversion of the case to Chapter 13.

²⁷ Cable v. Ivy Tech State College, 200 F.3d 467, 474 (7th Cir. 1999), *citing* In re Wells, 87 B.R. 732, 736 (Bankr. N.D. Ga. 1988). See also In re Barnes, 275 B.R. 889, 893 (Bankr. E.D. Cal. 2002) (although former Chapter 7 trustee who had been awarded compensation for Chapter 7 services had standing as an administrative claimant to seek to reconvert a Chapter 13 case to a Chapter 7, "conversion [to Chapter 13] prevented the former chapter 7 trustee from recovering the unscheduled assets from the debtors").

²⁸ See Cable, 200 F.3d at 475; 11 U.S.C. § 1306(a) (property of the Chapter 13 estate includes all property specified in Section 541 and all property acquired post-petition); 11 U.S.C. § 1306(b) ("the [Chapter 13] debtor shall remain in possession of all property of the estate"); 11 U.S.C. § 1303 ("the debtor shall have, exclusive of the trustee, the rights and powers of a trustee [to use, sell or lease property of the estate] under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title").

rather, the debtor regains full legal and equitable title in all property of the estate. Thus, when the Ewings' case was converted to Chapter 13, Rupp no longer had standing to demand the Ewings to turn over the tax refunds or to sue for the recovery of the value of the receivable for the benefit of the Ewings' creditors because the property had reverted in the Ewings upon conversion.

C. Dismissal of the Chapter 13 also vested all property of the estate in the Ewings

Even if the estate had not reverted in the Ewings at conversion, it would have done so upon dismissal of the Chapter 13 on July 11, 2006. Pursuant to Section 349 of the Bankruptcy Code, dismissal "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title."²⁹ In addition, the dismissal vacated the Turnover Order obtained by Rupp that he sought to enforce in the Adversary Proceeding. Section 349 provides that "[u]nless the court, for cause, orders otherwise, a dismissal of a case other than under section 742 of this title . . . vacates any order, judgment, or transfer ordered, under section . . . 542[.]"³⁰ Accordingly, the Turnover Order was vacated.

Because Rupp had been terminated as Chapter 7 Trustee by operation of law, Rupp was divested of his authority to speak or advocate for the collective creditors' best interests, and because all property Rupp contended had been withheld from him was legally back in the possession of the Ewings, Rupp lost the right to demand and collect assets for the benefit of the Ewings' creditors. Rupp's status in the Chapter 13 case before and after dismissal was that of a bystander. Because as a displaced trustee, Rupp would not have had standing to object to the dismissal of the Chapter 13 case before it was dismissed, he likewise

²⁹ 11 U.S.C. § 349(b)(3).

³⁰ 11 U.S.C. § 349(b)(2). Section 542 of the Bankruptcy Code requires the debtor and anyone holding the debtor's property to turn non-exempt property over to the trustee. 11 U.S.C. § 542(a).

lacked standing to seek vacation of the dismissal. Moreover, Rupp's standing to pursue the Adversary Proceeding in order to recover assets for the benefit of creditors had also terminated.

D. Rupp did not assert the Motion to Reopen in his capacity as an alleged administrative claimant

In his supplemental brief, Rupp argues that because a former Chapter 7 trustee may hold an administrative claim against the estate after a case is converted to Chapter 13, such a trustee has standing to participate in the Chapter 13 case as a claimant.³¹ However, Rupp did not bring his Motion to Reopen in his capacity as an individual holding an administrative claim, but rather in his capacity as fiduciary of the Ewings' bankruptcy estate.

In his Motion to Reopen, Rupp stated that he, as Chapter 7 Trustee, requested the relief "in order that the Chapter 7 Trustee can complete the administration of the Chapter 7 bankruptcy estate and prosecute the adversary proceeding No. 05-2776 to appropriate conclusion."³² Throughout the Motion to

³¹ Br. of Appellant Regarding Standing ("Supplemental Br.") at 2-4. This proposition is true as a general matter. Upon conversion of a Chapter 7 case to one under Chapter 13, the Chapter 7 trustee and its professionals *may* have a claim against the estate for services rendered prior to conversion. See Cable, 200 F.3d at 474 (upon conversion, "the trustee became just another creditor with standing to recover fees from the estate, but without standing to act on behalf of the estate, either to challenge the conversion or for any other purpose, including prosecuting or defending tort actions that belonged to the estate"). However, in this case, there is no evidence that Rupp possessed such a claim.

Rupp relies on In re Czykoski, 320 B.R. 385 (Bankr. N.D. Ind. 2005), for the proposition that conversion "[does] not necessarily end the [Chapter 7] trustee's involvement in the case." Supplemental Brief at 2. In Czykoski, the bankruptcy court held that the Chapter 7 trustee did not lose standing to prosecute a motion to dismiss even after the debtors converted their Chapter 7 case to Chapter 13, because former Chapter 7 trustees may become creditors of the estate, and as such, would have standing to seek dismissal of a Chapter 13 case. See Czykoski, 320 B.R. at 389-90. The Czykoski court did not discuss whether the displaced Chapter 7 trustee had in fact established a claim against the estate. As the Chapter 7 trustee's standing was not critical to the result because the United States Trustee, whose standing was indisputable, had also joined in seeking to dismiss the case, the Czykoski court's analysis of the Chapter 7 trustee's standing is dicta.

³² Motion to Reopen at 1, *in* APPX at 33.

Reopen, Rupp referred to himself as the Chapter 7 Trustee, not as an administrative claimant. For example, Rupp stated–

the Trustee asserts that there is cause to reopen the 2005 bankruptcy case[,] the Trustee requests that the debtors' case be reconverted from Chapter 13 to Chapter 7 since it was in Chapter 13 at the time of dismissal[, and the] Trustee also requests that the Court enter a pre-trial scheduling order in order that the prosecution of that adversary proceeding 05-2776 might go forward. Again, the Chapter 7 Trustee alleges that the debtors should be denied a discharge with prejudice under § 727 of the Bankruptcy Code and that the Chapter 7 Trustee is entitled to a money judgment against the Defendants in the amount no less than \$48,000[.]³³

The Adversary Proceeding was brought by Rupp in his capacity as Chapter 7 Trustee, and requested both denial of the discharge (which claim became moot upon conversion to Chapter 13 and again upon dismissal of the Chapter 13 case)³⁴

³³ Id. at 3, *in* APPX at 35.

³⁴ In his Supplemental Brief, Rupp also contended that even though the Ewings did not receive a discharge and no longer seek a discharge in the dismissed case, his claim in the Adversary Proceeding for denial of discharge was not moot because a judgment denying discharge would insure that the Ewings could never discharge the debts they had when they commenced their first Chapter 7 case. Supplemental Br. at 4. However, Rupp's denial of discharge claim, which was asserted pursuant to Section 727 of the Bankruptcy Code, became moot when the case was converted to Chapter 13 because Section 727 only applies to Chapter 7 discharges. See 11 U.S.C. § 103(b).

"[A] plaintiff must maintain standing at all times throughout the litigation for a court to retain jurisdiction." Yellow Cab Coop. Ass'n v. Metro Taxi, Inc. (In re Yellow Cab Coop. Ass'n), 132 F.3d 591, 594 (10th Cir.1997) (citation and internal quotation marks omitted). "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." Id. at 594-95 (internal quotation marks omitted). Further, the injury to the plaintiff to be redressed must be "concrete and particularized," and "actual or imminent, not conjectural or hypothetical." Id. at 594 (citation and internal quotation marks omitted).

When the case was converted to Chapter 13, the Ewings were no longer seeking a Chapter 7 discharge. At that point, Rupp's objection to discharge under Section 727 no longer stated a viable claim for relief. See, e.g., Mann v. Hahn (In re Hahn), 167 B.R. 693, 695 (Bankr. N.D. Ga. 1994) (court lost jurisdiction over Section 727 objection to discharge adversary proceeding when underlying bankruptcy case was converted to Chapter 13 because the claim was both moot (*i.e.*, the debtor was not seeking a Chapter 7 discharge) and not ripe (*i.e.*, the potential that the case would be reconverted to Chapter 7 was hypothetical)). Cf. Kistler v. Cleveland (In re Cleveland), 353 B.R. 254, 258-59 (Bankr. E.D. Cal. 2006) (although United States Trustee's Section 727 discharge objection was "not justiciable" upon conversion to Chapter 13, because adjudication of the objection would require the court to render an advisory opinion as to the availability of the

(continued...)

and recovery of alleged assets of the estate. In justifying the delay in filing the Motion to Reopen, Rupp argued that he, as Chapter 7 Trustee, attempted to negotiate a settlement of the Adversary Proceeding, something an administrative claimant would have no plausible authority to do.³⁵ In his oral argument to the bankruptcy court, Rupp repeatedly referred to himself in his capacity as “trustee,” (e.g., “[t]he trustee asks that the 2005 case be reopened, that it be converted back to a 7 and that the Court holds a scheduling order for a pending adversary proceeding.”).³⁶ Finally, at oral argument before this Court, Rupp was asked by Judge Brown whether he sought relief as an administrative claimant or as the trustee, and Rupp represented that he was seeking to pursue the rights of a trustee on behalf of himself and all creditors.

The record lacks any support for Rupp’s contention that he filed the Motion to Reopen as an administrative claimant of the Ewings’ estate.

E. Rupp has not established that he held an administrative claim in the Chapter 13 case

In any event, nothing in the record establishes that Rupp actually possessed an administrative claim. In his No Asset Report, Rupp represented that he collected no assets and no distributions were made to creditors. Accordingly, he

³⁴ (...continued)

discharge if the case was reconverted to a Chapter 7, the court stayed the discharge proceeding “so long as the Debtor remains in chapter 13”).

Moreover, the dismissal of the Chapter 13 case terminated the Ewings’ endeavor to obtain any type of discharge, which further rendered the Section 727 claim moot. Rupp contended that he continued to seek denial of the discharge of debts that existed on the petition date of the first Chapter 7 case because the Ewings could file another Chapter 7 case in the future. Rupp’s endeavor to preclude a hypothetical future discharge in another case does not present a “live” or “imminent” controversy over which the bankruptcy court may assume jurisdiction, however.

³⁵ Chapter 7 Trustee’s Reply to Debtors’ Objection to Motion to Reopen the Debtors’ Case at 3, *in* APPX at 39, 41.

³⁶ May 9, 2007, Tr. of Proceedings at 4, *ll.* 11-14, *in* APPX at 50.

was not entitled to any compensation as trustee based on moneys distributed.³⁷

Rupp argued that his administrative claim arises from costs and expenses incurred by him as counsel to the Chapter 7 Trustee for “among other things, [filing] a motion to extend the time to oppose the Debtors’ discharge and [filing] an adversary proceeding against the Debtors.”³⁸ The Bankruptcy Case Docket Sheet does not reflect that the bankruptcy court awarded professional fees to Rupp as counsel to the Chapter 7 Trustee. In fact, the docket sheet establishes that Rupp neglected to seek approval of his employment as counsel to the Chapter 7 Trustee pursuant to Section 327(a) of the Bankruptcy Code, and there is no order granting approval of such employment.³⁹ Without an order authorizing his employment, Rupp was not entitled to recover in the Chapter 13 case any fees for professional services rendered in the Chapter 7 case. “[A]ny professional not obtaining [bankruptcy court] approval is simply considered a volunteer if it seeks payment from the estate.”⁴⁰

Notwithstanding that Rupp had not made any distributions and had not been

³⁷ See Section 326(a) of the Bankruptcy Code, which provides –

In a case under chapter 7 . . . , the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee’s services, payable after the trustee renders such services, not to exceed 25 percent on the first \$5,000 or less, 10 percent on any amount in excess of \$5,000 but not in excess of \$50,000 . . . [etc.], upon all moneys disbursed or turned over in the case by the trustee to parties in interest, excluding the debtor, but including holders of secured claims.

11 U.S.C. § 326(a).

³⁸ Supplemental Br. at 3.

³⁹ Bankruptcy Case Docket Sheet at 6-7, *in* APPX at 6-7.

⁴⁰ Interwest Bus. Equip., Inc. v. United States Trustee (In re Interwest Bus. Equip., Inc.), 23 F.3d 311, 318 (10th Cir. 1994). See also In re Albrecht, 245 B.R. 666, 671-72 (10th Cir. BAP), aff’d, 233 F.3d 1258 (10th Cir. 2000) (trustee’s professionals who were not approved by the court, and therefore could not recover fees pursuant to Section 330 of the Bankruptcy Code, could not be compensated by the estate under Section 503(b)(1)(A) either).

employed as a professional, Rupp argued that he had an administrative claim in the Chapter 13 case pursuant to In re Barkell, No. 05-38602, 2006 WL 4846380 (Bankr. D. Utah Aug. 11, 2006).⁴¹ In the Barkell case, Rupp, as Chapter 7 trustee, incurred expenses investigating the value of the debtors' home for the purpose of determining whether non-exempt equity could be realized for the benefit of creditors. After determining such equity existed, Rupp began the process of liquidating the home by listing it for sale through a realtor. At that point, the debtors converted their case to Chapter 13. The home was sold after conversion, with the non-exempt proceeds apparently applied to the Chapter 13 plan, and Rupp sought to recover fees he incurred prior to conversion. The bankruptcy court specifically declined to award Rupp professional fees because the court had not approved him or his firm as counsel to the Chapter 7 trustee pursuant to Section 327(a). With respect to trustee fees, however, the bankruptcy court bypassed the limitations on Chapter 7 trustee fees set by Sections 326(a) and 330 of the Bankruptcy Code, and awarded fees on the basis of *quantum meruit* because ultimately, Rupp's services had conferred a substantial benefit on the debtors' creditors when the home was sold.

Another bankruptcy court in this circuit has concluded that a trustee may be compensated only to the extent authorized in Sections 326(a) and 330, and rejected a similar *quantum meruit* claim asserted by a displaced Chapter 7 trustee.⁴² This Court need not, and does not, express an opinion as to whether Sections 326(a) and 330 of the Bankruptcy Code declare the exclusive means by which Chapter 7 trustees may be compensated, or whether trustees may seek compensation under equitable principles such as *quantum meruit*, because in this case, Rupp's trustee services did not confer any benefit on the Ewings' creditors.

⁴¹ Supplemental Br. at 3-4.

⁴² See In re Murphy, 272 B.R. 483, 485-86 (Bankr. D. Colo. 2002).

Nothing Rupp did in the Chapter 7 case resulted in any distribution to creditors prior the dismissal of the Chapter 13 case. Accordingly, Rupp has not established that he even arguably possessed a *quantum meruit* claim in the Ewings' Chapter 13 case.⁴³

Even if Rupp had sought to vacate the dismissal order in the capacity of an administrative claimant, he failed to establish his status as such. Because “standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record,”⁴⁴ Rupp’s assertion of standing as an administrative claimant fails.

VI. CONCLUSION

The Court concludes that Rupp lacked standing to move for vacation of the dismissal of the Chapter 13 case in order to reopen the case, convert it to Chapter

⁴³ In his Supplemental Brief, Rupp also argues he has standing as an administrative claimant to seek to *reopen a closed case*. Supplemental Br. at 3. The Court notes that generally a creditor does have standing to seek to reopen a closed Chapter 7 case to administer unscheduled assets because the creditor has a stake in the potential distribution. Moreover, a former Chapter 7 trustee has standing to reopen a closed Chapter 7 case to administer unscheduled or otherwise unadministered assets. When a Chapter 7 trustee is discharged after completing the administration of a Chapter 7 case, all unadministered scheduled assets are abandoned to the debtor by operation of law, but unscheduled assets remain property of the estate and, as such, property entrusted to the Chapter 7 trustee. See 11 U.S.C. § 554(c) and (d). In such a case, the former Chapter 7 trustee clearly has standing (as holder of title to unscheduled property) to reopen the case to administer property of the estate.

In this proceeding, however, Rupp did not seek to reopen a closed Chapter 7 case, but rather sought to vacate the dismissal of a Chapter 13 case. Both conversion and dismissal operated to revest all estate property, whether or not such property was scheduled, in the Ewings. See 11 U.S.C. §§ 349(b)(3), 1306(b). Because upon dismissal, there is no longer any “property of the estate,” reopening a dismissed case to “administer property of the estate” is a meaningless act. Likewise, vacating the dismissal in a Chapter 13 case in order to recover and administer property of the estate is also futile because neither a former Chapter 7 trustee nor an administrative claimant have the authority to “recover” estate property that is in the lawful possession of Chapter 13 debtors.

⁴⁴ FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (internal citation and quotation marks omitted); Bender v. Williamsport Area School Dist., 475 U.S. 534, 546-47 (1986).

7, and prosecute the Adversary Proceeding.⁴⁵ Because the bankruptcy court lacked jurisdiction to adjudicate Rupp's motion, the Order appealed is VACATED and this matter is REMANDED to the bankruptcy court with instructions to deny the motion for lack of jurisdiction.

⁴⁵ Although this Court has determined that the bankruptcy court lacked subject matter jurisdiction due to Rupp's failure to establish his standing to seek the relief requested, and that Rupp likewise lacks standing to obtain such relief on appeal, we "have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining" the motion filed by Rupp. Bender, 475 U.S. at 541 (internal quotation marks omitted).